



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

CASE OF SIPAVIČIUS v. LITHUANIA

(Application no. 49093/99)

JUDGMENT

STRASBOURG

21 February 2002

FINAL

10/07/2002

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Sipavičius v. Lithuania,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr G. RESS, *President*,

Mr L. CAFLISCH,

Mr P. KŪRIS,

Mr R. TÜRMEŃ,

Mr J. HEDIGAN,

Mrs M. TSATSA-NIKOLOVSKA,

Mrs H.S. GREVE, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 31 January 2002,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 49093/99) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Lithuanian national, Stasys Sipavičius ("the applicant"), on 6 April 1999.

2. The applicant, who had been granted legal aid, was represented before the Court by Mr U. Salburg, a lawyer practising in Vienna, Austria. The Lithuanian Government ("the Government") were represented by their Agent, Mr G. Švedas, Deputy Minister of Justice.

3. The applicant alleged, in particular, that criminal proceedings against him had violated Article 6 of the Convention in that, since he had been prosecuted for abuse of office, the first instance court's reclassification of the offence as official negligence prevented him from exercising his defence rights properly.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

5. By a decision of 28 November 2000 the Chamber declared the application partly admissible.

6. The Government, but not the applicant, filed observations on the merits.

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant is a Lithuanian national, born in 1950 and living in Kaunas.

9. The applicant, a police commissioner, was suspected of involvement in a conspiracy to smuggle non-ferrous metals in view of his alleged failure to investigate properly the activities of certain smugglers in 1994. He was arrested on 18 August 1995 in the context of criminal proceedings instituted in 1992. There were eight co-accused in the case, including the applicant.

10. On 22 August 1995 he was charged with obtaining property by deception (*sukčiavimas*) under Article 274 of the Criminal Code, abuse of office (*piktnaudžiavimas tarnyba*) under Article 285 of the Code, and official forgery (*tarnybinis suklastojimas*) under Article 289 of the Code. On 29 November 1995 the prosecution dropped the last charge.

11. From 1 December 1995 to 18 January 1996 the co-accused had access to the case-file. On 14 February 1996 a prosecutor confirmed the bill of indictment whereby the applicant was indicted for offences under Articles 274 and 285 of the Criminal Code. On 20 February 1996 the case was transferred to the Vilnius Regional Court.

12. On 17 May 1996 a judge of the Vilnius Regional Court ordered additional investigations and requested that the prosecution supplement the charges under Articles 274 and 285 of the Criminal Code. On 26 June 1996 the Court of Appeal quashed the decision, finding that the Regional Court was able to consider the question of committal for trial without further investigation measures. The Court of Appeal also ordered the applicant's release on bail. He was released in open court. On 9 July 1996 the Court of Appeal remitted the case to the Vilnius Regional Court.

13. On 20 September 1996 the judge of the Vilnius Regional Court committed the applicant for trial on the charges under Articles 274 and 285 of the Criminal Code.

14. During the trial hearing on 24 April 1998 the judge stated:

“... the charge of cheating may be supplemented ... [and] the charge under Article 285 [of the Criminal Code] may be amended by adding the ‘selfish interest’”

During the trial hearing on 11 May 1998 the judge said:

“... the charge under Article 285 may be supplemented ... with alleged breaches of [the specific provisions] of the Police Act”

During that hearing the trial judge informed the parties that she would pronounce the judgment on 22 May 1998.

15. On 22 May 1998 the Vilnius Regional Court acquitted the applicant on the count of obtaining property by deception under Article 274 of the Criminal Code. In connection with the charge under Article 285 the court

held: “the charge of abuse of office cannot be sustained... . However, [the applicant], being a State official, improperly performed his functions because of negligence” in that he had failed to ensure proper investigation and control of the smuggling case. Since this failure amounted to a breach of certain provisions of the Police Act, the judge found the applicant guilty of official negligence (*tarnybos pareigų neatlikimas dėl nerūpestingumo*) under Article 288 of the Criminal Code. He was sentenced to one year’s imprisonment and deprived of the right to occupy an official position in the system of law enforcement. The judge reduced the custodial sentence by one third pursuant to an amnesty law, and found that the applicant had completed the sentence on account of the time spent in detention on remand.

16. The applicant appealed against the judgment of 22 May 1998, stating that the Vilnius Regional Court had convicted him of an offence not covered by the initial charges and in respect of which he had not been in a position to defend himself. He noted in particular that during the trial the judge had in no way indicated that the charge of abuse of office could be replaced by one of official negligence.

17. On 9 September 1998 the Court of Appeal held an appeal hearing on questions of fact and law in the presence of the applicant and his defence lawyer. The appeal court heard addresses by the applicant and a prosecutor. The Court of Appeal dismissed the applicant’s appeal on the ground *inter alia* that:

“the allegation that the reclassification was not permitted is unfounded. Both Articles [285 and 288 of the Criminal Code] punish offences against State office. The [first instance court] court only established that [the applicant] improperly performed his functions as an officer because of negligence, but that he did not deliberately take advantage of his official position contrary to the interests of his office. The [original] charge did not refer to breaches [by the applicant] of specific provisions of the Police Act. In accordance with Articles 279 § 2 and 280 of the Code of Criminal Procedure, the court warned [the applicant] that the charge could be supplemented with breaches of [the specific provisions] of the Police Act. An adjournment was offered for the preparation of the defence, but the parties did not request such an adjournment The allegation that [the applicant] could not defend himself against the charges is therefore dismissed.”

18. The applicant filed a cassation appeal with the Supreme Court, complaining *inter alia* that the reclassification of the charge had breached his right to defend himself. On 2 March 1999 the Supreme Court dismissed the appeal, upholding the decisions of the lower courts. The cassation court held *inter alia* that the first instance court had reclassified the offence of abuse of office with that of official negligence in accordance with Articles 279 § 2 and 280 of the Code of Criminal Procedure as the appeal court had replaced the initial charge with a lesser one, merely drawing the legal conclusions consistent with the facts laid before it.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal Code (*Baudžiamasis kodeksas*)

19. Article 285 creates liability for deliberate abuse of office which may be punished by up to 5 years' imprisonment or a fine.

Article 288 punishes improper performance by State officials of their functions because of negligence with a custodial sentence of up to 4 years' imprisonment or a fine.

Disqualification from holding certain public offices may also be imposed as a supplementary penalty for these offences.

B. Code of Criminal Procedure (*Baudžiamojo proceso kodeksas*)

20. At the material time, Article 279 § 2 allowed a court to replace a charge with another one during the trial. Pursuant to Article 280 § 1, a court was entitled to replace a charge with a less severe one, provided that the facts on which the new charge was based did not, in principle, differ from those of the initial one. Under Article 280 §§ 2 and 6, the court could also replace a charge with a more severe one. In the latter case, on the defendant's request, the court could adjourn the trial to enable a revision of the defence.

On 5 February 1999 the Constitutional Court ruled that the provisions of Article 280 § 1 of the Code were compatible with the principles of a fair trial and defence rights guaranteed by the Constitution. The Constitutional Court also ruled that Article 280 §§ 2 and 6 of the Code, to the extent that it permitted the court to replace a charge with a more severe one, was incompatible with the Constitution.

21. Pursuant to Article 398 § 2 of the Code, if an appeal is filed against a judgment of the first instance court, the judgment becomes effective upon the determination of the appeal. In accordance with Articles 374-377, the competence of the appeal court extends to all questions of fact and law established by the first instance court, and the appeal court has the power to take a decision quashing or amending the conviction, or to pronounce a new judgment. Under Article 376 an appeal hearing is obligatory, and it must be conducted in the presence of the parties. Articles 398 § 4 and 399 § 4 provide that the decision of the appeal court becomes effective when it is pronounced.

22. Under Articles 416-423 of the Code, a cassation appeal can be submitted to the Supreme Court against a judgment which has become effective. The competence of the cassation court extends to questions of fact and law, and it has the power to quash or amend lower decisions.

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

23. The applicant complained that, since he had been prosecuted for abuse of office, the first instance court's reclassification of the offence as official negligence had prevented him from exercising his defence rights properly, rendering the criminal proceedings unfair.

24. Article 6 of the Convention in its relevant parts provides:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] tribunal

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

... .”

25. The Government stated that the offence of official negligence constituted an element intrinsic in the original charge of abuse of office, and that the replacement of the later charge with the former was made by the first instance court in accordance with the domestic substantive and procedural requirements. In addition, the fact that the first instance trial judge had twice warned the applicant on the possible amendments to the charges on 24 April and 11 May 1998 had afforded him the guarantees of Article 6 §§ 1 and 3 (a) and (b) of the Convention.

26. The applicant admitted that during the hearings of 24 April and 11 May 1998 the trial judge had warned him of the possible aggravation of the charge of obtaining property by deception and the amendment to the charge of abuse of office. However, neither of those warnings had indicated a possible reclassification of the charge of abuse of office under Article 285 of the Criminal Code or an introduction of a new charge of official negligence under Article 288 of that Code. The applicant claimed a violation of Article 6 on the ground that he had been convicted of a completely different offence than had been alleged before the conviction.

27. The Court recalls that the fairness of proceedings must be assessed with regard to the proceedings as a whole. The provisions of paragraph 3 (a) of Article 6 point to the need for special attention to be paid to the notification of the “accusation” to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against him. Article 6 § 3 (a) of the Convention affords the defendant the right to be informed not only of the

“cause” of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts. That information should be detailed (*Dallos v. Hungary*, no. 29082/95, 1.3.2001, § 47).

28. The scope of the above provision must in particular be assessed in the light of the more general right to a fair hearing guaranteed by Article 6 § 1 of the Convention. In criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair. In this respect it is to be observed that Article 6 § 3 (a) does not impose any special formal requirement as to the manner in which the accused is to be informed of the nature and cause of the accusation against him. The Court further recalls that sub-paragraphs (a) and (b) of Article 6 § 3 are connected and that the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused’s right to prepare his defence (*Pélissier and Sassi v. France* [GC], no. 25444/94, 25.3.1999, § 51, ECHR 1999-II).

29. In the present case, despite the fact that the Regional Court had indicated, a few weeks before the pronouncement of the first instance judgment, certain possible amendments to the charge of abuse of office (see § 14 above), it remains undisputed that until the conviction of 22 May 1998 the applicant was indeed not aware that the Regional Court might reclassify that offence as official negligence. This circumstance certainly impaired his ability to defend himself in respect of the charge.

30. However, the Court reiterates that compliance with Article 6 must be determined in light of the proceedings as a whole, including the appeal procedures. Indeed, in the above mentioned case of *Dallos* which concerned the reclassification by an appeal court of a charge upon which that applicant had been convicted, the Court attributed decisive importance to the subsequent proceedings before the Supreme Court, finding no violation of Article 6 in view of the fact that the Supreme Court had reviewed the case at an oral hearing from the relevant procedural and substantive points (see the *Dallos v. Hungary* judgment cited above, §§ 47-53).

31. In the instant case the applicant was entitled to contest his conviction in respect of all relevant legal and factual aspects before the Court of Appeal, which heard the parties at an oral appeal hearing and reviewed the applicant’s complaints about the reclassification of the charge from both the procedural and substantive point of view. It has not been alleged that the appeal court lacked power to quash the conviction and acquit the applicant, or that at the appeal level the applicant was unable to defend himself against the reformulated charge. It must also be noted that the conviction became effective under the domestic criminal procedure only after the pronouncement of the decision of the Court of Appeal (see §§ 17 and 21 above). Furthermore, even following the unsuccessful outcome of the

appeal procedure, the applicant's case was reviewed at the level of cassation jurisdiction by the Supreme Court which also examined the substantive and procedural elements of the reclassification, and was competent to afford the applicant the relief he sought (see §§ 18 and 22 above). The fact that at both appeal and cassation levels the applicant's pleadings against the reclassification were unsuccessful does not indicate that the review procedures were not capable of remedying the shortcomings of the first instance proceedings.

32. The Court therefore considers that the applicant had the opportunity to advance before the Court of Appeal and the Supreme Court his defence in respect of the reformulated charge. In this respect the present case must be distinguished from the above mentioned *Pélissier and Sassi* case (*loc. cit.*, §§ 51-63) where the Court of Cassation did not re-examine the "discretion" of the appeal court in reclassifying the charge, or the *T. v. Austria* case (no. 27783/95, 14.11.2000, §§ 70-72) where that applicant's complaints against the reclassification were rejected as constituting new facts which were inadmissible on appeal, and without an appeal hearing being held.

33. Assessing the fairness of the proceedings as a whole, the Court is satisfied that any defects in the proceedings before the Regional Court were cured by way of the review procedures (see, *mutatis mutandis*, the *Dallos* case cited above, *ibid.*). The Court is therefore convinced that the applicant's right to be informed in detail of the nature and cause of the accusation against him and to have adequate time and facilities for the preparation of his defence were not infringed.

34. It follows that Article 6 of the Convention was not violated.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no violation of Article 6 of the Convention.

Done in English, and notified in writing on 21 February 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Georg RESS
President